THE PARLIAMENT ACT AND THE BRITISH CONSTITUTION.

Sir William Anson, in the valuable article on this statute which he has contributed to THE COLUMBIA LAW REVIEW,[1] has approached his subject from more than one standpoint. He has dealt with it, first, as a constitutional lawyer; second, as a politician immersed in the actual struggle; thirdly, as a political prophet. My article,[2] to which his was an answer, was mainly confined to the constitutional aspect of the new situation; though I confess that, in its closing paragraphs, I indulged in some forecast of the great part reserved, in the new order of things, for a House of Lords which should as frankly accept the Revolution of 1911, as the Crown (to its infinite gain) has accepted the Revolution of 1832.

Sir William Anson would, I think, recognize the fact that a scientific discussion of constitutional questions can scarcely be conducted on the basis of accusations of revenge and partizanship. So long as political progress proceeds by struggle, whether the struggle is carried on by an appeal to arms, or by the war of words and the clash of debate, so long will that which to one side appears to be bare justice, to the other, seem to be a spiteful attack on vested interests; and charges of this kind will be freely made. Doubtless, to Charles I, Hampden in the field appeared to be seeking revenge for a lawful imprisonment; doubtless, to James II, the Seven Bishops were ungrateful schismatics; doubtless, to George III, the founders of the American Republic were rebellious subjects inspired by a mean hatred of justly constituted authority. About motives we shall, probably, never agree. It is more profitable to assume an objective standpoint.

Nor do I propose to occupy much space with the criticism applied by Sir William Anson to the historical parallel with which my article opens. It appears to him, that there is a fundamental difference between the Parliament Act and the great seventeenth century enactments known as the Petition of Right and the Bill of Rights, in that the older statutes "did not profess to deal with the distribution of political power or the comparative claims to supremacy of one or other House of Parliament," that, on the

[1] 12 COLUMBIA LAW REVIEW 673.

[2] *Ibid.* 32.

other hand, they did contain "assertions of some of the elementary rights necessary to the very existence of a free people," and that they "secured rights which should be common to all for every citizen in the land."

Analogy is not identity; but a controversialist may well think himself lucky if he never has a harder task than the defence of a parallel assailed on such grounds. It is true, that the Petition of Right and the Bill of Rights were not concerned with the claims to supremacy of one or the other House of Parliament. That struggle lay in the future. But they most emphatically were concerned with the distribution of political power between the King and Parliament; and, in effect, they decided, so far as law can do it, that the balance should fall on the side of Parliament. It is true, also, that they contained assertions of elementary rights; but, on the other hand, I know of no democracy in the world (other than Great Britain) in which it could be solemnly argued that the power, asserted by the Parliament Act, to give effect to their considered judgments, expressed through their elected representatives, was anything but an "elementary right necessary to the very existence of a free people." And I have read through the Parliament Act many times, without discovering that it secures rights which are not "common to all for every citizen in the land." The only citizens, as it seems to me, who cannot claim the benefit of the Parliament Act, are just the six hundred and thirty members of the House of Lords itself; and it would seem grotesque to regard them, eminent though some of them may be, as the "nation," and the eight million electors of the United Kingdom as a "class." Would anyone seriously argue that, if a Tory Government returned to power to-morrow, with Mr. Balfour or Mr. Law at its head, these gentlemen could not, on behalf of the House of Commons, which they would lead, make use of the powers conferred on that House by the Parliament Act? It is true that they might not wish to do so. But I am none the less grateful to the men who secured the passing of the Habeas Corpus Act, that I trust never to have to appeal to its provisions.

The second point on which my article is challenged by Sir William Anson is the matter of the "Money Bill" clause of the Parliament Act. But here it would appear that he has himself provided a most effective answer to his own criticism.

The point to which objection is taken is, that my article repsents section 1 of the Parliament Act as having consecrated "the

state of things which all politicians treated as indisputable for many years prior to 1909." Sir William Anson then suggests[3] that the famous Finance Bill of 1909 (the "Lloyd George Budget") would not have fallen within the terms of that section; and that, therefore, in the opinion of no less a person than Mr. Gladstone, the Lords were justified in rejecting it. Let us, for the sake of argument, concede this last contention. How does it affect the truth of my statement? My article stated, that the Parliament Act consecrated the existing practice,—*i. e.*, the practice under which purely financial measures were treated as beyond the jurisdiction of the Lords. My critic replies, that the Budget of 1909 was not a purely financial measure, and could not have been forced upon the Lords under the Parliament Act. I might be content to leave it at that; merely expressing the hope that, if this view be correct, the stringent wording of the Parliament Act will lead to the wholesome practice of confining Finance Bills to purely financial matters. But I cannot help pointing out (1) that this view of the present law entirely deprives of its terrors that dramatic passage in Sir William Anson's article,[4] in which he depicts the impotence of the Lords to check a revolution engineered in the last session of a moribund Parliament by means of a catastrophic Money Bill, and (2) that, when the Budget of 1909 was introduced, there seemed, to the majority in the House of Commons, to be absolutely no choice between making it a complete measure, and meekly accepting perpetual defeat. For, from 1906 to 1909, the Lords were engaged in the dangerous pursuit of sitting on the safety-valve; and it is only the partial relaxation of that pressure by the Parliament Act which has since rendered it unnecessary for a Progressive House of Commons to strain the Constitution.

On the great importance of maintaining the impartial attitude of the Chair, my critic and myself are at one. The difference between us lies in the fact that, whereas I have ventured to hope that the Speaker's office will emerge unscathed from the ordeal of the Parliament Act, Sir William Anson has not such faith in its resisting power. I should naturally hesitate to put my own personal opinion against that of one whose opportunities of forming a personal judgment in such a matter are unrivalled. But I will venture to offer a word in mitigation of the arguments which are put forward to support his view.

[3] *Ibid.* 673, 679.
[4] *Ibid.* 680.

Sir William Anson draws attention to the fact (by implication admitted in my own article) of the somewhat modern character of the great reputation for impartiality enjoyed by modern Speakers. And from this fact he seems to draw the inference, that such reputation will hardly stand the strain imposed by that provision of the Parliament Act which requires the Speaker to decide whether an alleged Money Bill falls within the scope of section 1. But is not this rather a dangerous argument, which might well have been used to limit the confidence deservedly earned by the Courts of Law during the eighteenth and nineteenth centuries? Do not all students of history know, that the impartiality of the judges left much to be desired in the Stuart days? And have we any reason to suppose that the measures which have secured the splendid transformation of the judicial bench will fail in their beneficent effect upon the Speaker's office? The Speaker is now chosen[5] and remunerated in the same way as, and, substantially, given equal security of tenure with, the judges. The material from which he is selected is as abundant as that available for the recruitment of the Judicial Bench; and the criticism brought to bear on his selection is even more searching. As Sir William Anson has himself admitted, the Speaker's impartiality has passed the test of his duties under the closure. It seems illogical to doubt that it will be equally proof against the responsibilities of the Parliament Act.

Though I think that Sir William Anson has (unintentionally) been somewhat less than fair to my article in his penultimate paragraph,[6] I am much interested in the practical suggestion he puts forward. In my article[7] I made what appeared to me to be a handsome admission as to the "great ability and wide political experience" of many members of the present House of Lords. Sir William Anson thinks that it would be unjust and unwise "to relegate this trained ability to an assembly the duties of which are confined to revision, suggestion, and delay;" and he doubts "very much whether it will be possible to refuse these men access to the assembly which is now the seat of legislative sovereignty." Personally, I am much inclined to agree with him. I see no reason why a peer should not be enabled to resign his peerage and boldly claim the suffrages of the electors. Whether such resigna-

[5] Of course the judges are nominally appointed by the Crown; while Mr. Speaker is elected by the House. But, in both cases, the choice really lies with the Cabinet.

[6] *Ibid.* 673, 684.

[7] *Ibid.* 32, 41-2.

tion should be binding on his successors in the peerage, would be matter for serious discussion; but at least it would have to be binding on himself for life, for a scheme of "in and out" peerages would hardly be likely to commend itself to the national sense of justice. But, subject to this condition, I think the House of Commons would gain considerably by the suggested change; though I somewhat doubt whether it would be altogether to the good of the House of Lords.

To come, in conclusion, to the main question: whether the substantial change in British constitutional law effected by the second section of the Parliament Act is likely to work satisfactorily towards the peaceful development of political progress. I will admit, at once, that the provision for what may be called "suspended legislation," though not entirely unprecedented in Great Britain, and certainly not without precedent in Britain beyond the seas, is in the nature of political experiment. In one sense, it is a less drastic substitute for the sterner provisions of the Bill of Rights; and I will not weary the readers of the REVIEW by repeating the considerations by which I tried to show, in my former article,[8] that it will probably exercise a restraining influence on revolutionary proposals. But I fail to see in what way it will be more stultifying for a Government to accept defeat of one of its measures at the hands of the Lords under the present than under the old system. The Government can still, if it pleases, with the assent of the Crown, appeal at once to the country; or, on the other hand, it can, as it did with the Education Bill and the Plural Voting Bill in 1906, and the Licensing Bill in 1908, abandon the measure until a more favourable opportunity occurs. As to the attitude of the country in the meanwhile, that will depend greatly on the state of popular feeling, and the amount of interest aroused by the measure. But I have too much faith in the common sense of my fellow-countrymen, to suppose that they will regard such a state of things as a justification for disorder; for, obviously, it leaves open the way for a more legitimate campaign, in which each side may hope to attain its ends by peaceful means. Compromise is often claimed as the peculiar genius of British politics; and a delay of two years will afford a more promising opportunity for the exercise of that genius, than the heat of a struggle in which everything must be finally decided by a few weeks of acrimonious debate. Any constitution can be wrecked if sufficient people make up their minds

[8] *Ibid.* 32, 38-9.

to wreck it. But I see no reason to suppose that the very elastic fetters (to borrow a metaphor from Sir William Anson) laid upon the prerogative of the House of Lords by the Parliament Act, will be more likely to lead to bloodshed, than were those provisions of the Bill of Rights by which the prerogative of the Crown was "gagged and bound." And if, as Sir William Anson seems inclined to fear, the House of Commons should in the future abuse its great powers, then I firmly believe that the nation (in ways which it is not impossible to foresee) will be able to curb its powers as it has curbed the powers of the Lords.

In a few words, then, I am inclined to take a hopeful view of the Parliament Act for three reasons. First, because it follows the well-tried path of British constitutional development, which leads to the restriction of the powers, rather than to the abolition or structural modification, of ancient institutions. Second, because, as I tried to show in my former article, it sets the House of Lords free from its present invidious and anomalous position to pursue an useful career as a moderator in domestic politics and as an organ of Imperial unity. And, third, because it affords reasonable scope for that development of popular self-government which the immense economic, intellectual and social changes of the past century have rendered inevitable.

In this last consideration, I fear I shall not carry my critic with me. But, with all my respect for the individual abilities and virtues of many members of the House of Lords, and with full recognition of the services rendered by that House to the nation in times gone by, it seems to me impossible to maintain the attitude assumed by that House in recent years, or to admit that, by virtue of these qualities and services, the House of Lords has an hereditary mortgage on the destiny of the nation. Mr. Balfour's indiscreet boast, interpreted, as it was, by the rejection of the Finance Bill of 1909, was a challenge to the manhood of a high-spirited people; and it has been answered in a manner thoroughly in accordance with the national tradition. Had the attitude of the House of Lords, during the years 1906 to 1911, been more in accordance with the wise and impartial constitutional attitude of Sir William Anson himself, and had Mr. Balfour's challenge not been uttered, the day of reckoning might have been long postponed. But the Fates ordained otherwise; and the crisis became inevitable. Thus is history made.

EDWARD JENKS.

LONDON.